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ABSTRACT

This paper provides an overview of the legal standards for faculty integration and an analysis, based on case study research in four cities, of the issues that have arisen in the implementation of these standards by the Federal Office for Civil Rights. Part I reviews the major legal issues and puts them into a historical perspective. Part II develops the implementation issues, drawing upon faculty desegregation experiences in Los Angeles, Chicago, Philadelphia, and New York. The concluding section, Part III, considers recent judicial decisions and administrative policy changes and their implications. (GC)

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FACULTY DESEGREGATION: THE LAW AND ITS IMPLEMENTATION

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FACULTY DESEGREGATION: THE LAW AND ITS IMPLEMENTATION

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INTRODUCTION

In its landmark ruling in Brown v. Board of Education, 347 U.S. 483 (1954), the United States Supreme Court held that separate educational facilities are inherently unequal and unconstitutional. This holding has consistently been applied by the courts not only to segregation of students, but also to segregation of teachers and administrators:

> Independent of student assignment, where it is possible to identify a "white school" or a "negro school" simply by reference to the racial composition of teachers and staff...a prima facie case of violation of substantive constitutional rights under the equal protection clause is shown. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 18 (1971).

Accordingly, requirements to desegregate teaching and administrative staffs have been a major component of systemwide desegregation plans in almost all the major desegregation cases of the past three decades.

Faculty desegregation requirements originally developed as an integral part of the dismantling of dual school systems in the South. Integration of teaching staffs was necessary to break down the identification of "black schools" and "white schools," and it also provided multiracial adult support and role models for students going through the desegregation process. In the 1970s, when the focus of desegregation efforts began to shift to the large urban areas in the North and the West, an ironic shift developed: faculty

desegregation took on a life of its own as the courts and the administrative enforcement agencies slowed their pursuit of thoroughgoing student desegregation remedies and tended to concentrate instead on faculty desegregation issues in isolation.

Compared with the administrative complexities and political confrontations involved in attempts to integrate students, the process of faculty integration is relatively straightforward: racial imbalance patterns are easier to identify, harder to justify, and are more readily remedied through the application of numerical guidelines or quotas. The results of the faculty desegregation process have also generally been more successful in terms of maintaining stable racial balances over extended periods of time, at least partially because teachers have financial and career seniority incentives which militate against the "white flight" patterns that have plagued student desegregation efforts in northern urban areas.[1]

This paper provides an overview of the legal standards for faculty integration and an analysis, based on case study research in four cities, of the issues that have arisen in the implementation of these standards by the federal Office for Civil Rights. Part I

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[1] For a detailed discussion of the factors behind "white flight" and the extent to which it has made thoroughgoing student desegregation virtually impossible in many northern cities, especially given the limitations on interdistrict remedies imposed by the Supreme Court's decision in Milliken v. Bradley, 418 U.S. 717 (1974), see Gewirtz, Remedies and Resistance, 92 Yale L.J., 585, 628-665 (1983). Cf. G. Orfield, Must We Bus? (1978) (Arguing that in many northern and western cities, meaningful desgregation is still possible); see also Liddell v. Board of Education of the City of St. Louis, 567 F.Supp. 1037 (D. Mo. 1983) (Settlement plan between city and school district and 21 suburban districts providing for interdistrict student and faculty desegregation remedies).

reviews the major legal issues and puts them into a historical perspective. Part II develops the implementation issues, drawing upon faculty desegregation experiences in Los Angeles, Chicago, Philadelphia, and New York. The concluding section, Part III, considers recent judicial decisions and administrative policy changes and their implications.

FACULTY DESEGREGATION LAW: 1954-1980

In the early years following Brown v. Board of Education, the courts' primary focus was on the dismantling of dual school systems in the South, where state statutes and official policies had mandated separate schools for black and white students--and teachers. At first, the courts tended to tolerate a variety of practices such as "freedom of choice" plans and "pupil assignment laws" which in theory granted black students the right to attend previously all-white schools, but in practice resulted in little real integration. Granting individual black students a right, in the abstract, to attend "any" school did not provide a realistic opportunity, because few blacks were willing to face the hostile environment of a school with all white student bodies--and faculties.

In 1968, the Supreme Court invalidated a "freedom of choice" plan under which no white had gone to a black school and 85 percent of the blacks in the district still attended the all-black school. Green v. County School Board, 391 U.S. 430. The Court's unanimous opinion emphasized results and required the school board to develop "a plan that promises realistically to work and promises realistically to work now." Green was followed a year later by an additional

blunt directive from the Supreme Court in Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969) that southern school districts must "begin immediately to operate as unitary school systems."

The Supreme Court's strong mandate in Green and Holmes, which, however, occurred after more than a decade of relative inaction by the High Court,[2] was paralleled in the 1960s by forceful Congressional insistence on prompt, meaningful desegregation. Recognizing that federal money was continuing to be utilized to build schools and support educational programs that segregated black children, Congress, in Title VI of the 1964 Civil Rights Act, explicitly prohibited discrimination on the basis of race in programs receiving federal financial assistance:

> No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. 42 U.S.C. § 2000(d).

Title VI's prohibition against discrimination in programs receiving federal aid took on added significance with the passage of Title I of the Elementary and Secondary Education Act of 1965. Ending the historical reluctance of the federal government to provide funding for local education programs, Title I made billions of dollars available to school districts throughout the country to provide

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[2] G. Wilkinson, From Brown to Bakke (1979).

programs for disadvantaged students.[3]

With the passage of Title VI and the E.S.E.A., the U.S. Department of Health, Education and Welfare commenced an extensive enforcement effort to compel desegregation in thousands of southern school districts that were applying for federal funds. A new unit, the Office for Civil Rights (OCR), was established to oversee this enforcement process, and OCR promptly issued guidelines emphasizing specific standards for both student and faculty desegregation. OCR's legal authority to act in this manner was strongly challenged, but both its general authority and the validity of its specific guidelines were upheld by the courts. The key decision in this regard was that of the United States Court of Appeals for the Fifth Circuit in United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966).

In the faculty desegregation area, the fundamental challenge to OCR's authority was based on the language of Section 604 of the Civil Rights Act which precluded Title VI enforcement in regard to employment practices "except where a primary object of the federal financial assistance is to provide employment." Thus, it was argued, although OCR would have jurisdiction over federally funded job training programs, the major Title I grants to aid disadvantaged

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[3]Passage of the two Acts was not unrelated. Numerous aid to education bills had died in Congress because southern congressmen would not accept riders--put on all such bills by Adam Clayton Powell, Chairman of the House Education and Labor Committee--which would deny any federal aid for programs that were found to discriminate. After the basic battle had been fought on Title VI (which in essence provided an automatic, uniform "Powell Amendment"), new programs such as Title I could be judged on their merits without repeated fights over civil rights riders.

students were not directly employment related and, hence, OCR could not impose faculty desegregation requirements on districts applying under Title I.

The court in Jefferson County held, however, that OCR had "indirect" jurisdiction because faculty desegregation was a necessary and inherent aspect of student desegregation:

> Section 604 was never intended as a limitation on desegregation of schools. If the defendant's view of Section 604 were correct the purposes of the statute would be frustrated, for one of the keys to desegregation is integration of faculty. As long as a school has a Negro faculty it will always have a Negro student body. Id. at 883.

Despite this strong statement on the basic liability issue, the court in Jefferson County was reluctant to require strict numerical remedies. Differing from some district courts that had issued orders requiring precise racial balances in faculty assignments,[4] the Fifth Circuit said that "on principle,... the selection and assignment of teachers on merit should not be sacrificed just for the sake of integrated faculties; teaching is an art." Id. at 892. Accordingly, the court issued an order requiring in general terms that racial discrimination in the hiring and assignment of new faculty members be discontinued and that "affirmative programmatic steps" be taken to correct existing effects of past racial assignment.

Three years later, the Supreme Court took a much tougher stand on the use of numerical guidelines to assess the efficacy of faculty

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[4] See, e.g., Dowell v. School Board of Oklahoma City Public Schools, 244. F.Supp. 971 (W.D. Okla. 1965), aff'd 375 F.2d 158 (10th Cir. 1967); Kier v. County School Board of Augusta County, 249 F. Supp. (W.D. Va., 1966).

desegregation plans. In United States v. Montgomery County Board of Education, 395 U.S. 225 (1969), the Court reversed the appellate court and reinstated the district court's requirement that the board must move toward a goal under which "in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system."[5]

Following the Supreme Court's decision in Montgomery County, and its directive to the lower courts to begin immediately to assure the dismantling of dual school systems in Holmes, supra, the Fifth Circuit reconsidered the orders it had issued in Jefferson County and other cases, and in 1970 it issued a new mandate, requiring immediate steps towards meaningful desegregation. Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir. 1970). The new faculty desegregation requirement which the court imposed on the school systems under its jurisdiction in the deep South provided that staff be assigned "so that the ratio of Negro to white teachers in each school, and the ratio of other staff in each, are substantially the same as each such ratio is to the teachers and

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[5]The emphasis on numerical goals received a further, dramatic impetus from the Supreme Court in 1971 in the Swann decision, supra, where, after endorsing the use of mandatory busing, the Supreme Court also upheld the district court's insistence on a goal of approximate compliance in each school of the district with the 71 percent/29 percent white/black racial proportions of the district's student population as a whole. The Court emphasized, however, that endorsement of numerical guidelines as "a starting position in the process of shaping a remedy...does not mean that every school in every community must always reflect the racial composition of the school system as a whole." 402 U.S. at 24-25.

and other staff, respectively, in the entire school system."[6] Id. at 1218.

This "substantial equivalency" requirement, which was usually implemented with numerical benchmarks that permitted a deviation from systemwide racial ratios in any school of no more than 5 percent, became known as the "Singleton ratio." Over the years it came to be utilized as the basic enforcement guideline by courts and administrative agencies throughout the country. See, e.g., United States v. Texas Education Agency, 510 F. Supp. 994, 995 (E.D. Tex. 1981).

As significant progress began to be achieved in the dismantling of dual school systems in the South in the late sixties and early seventies,[7] judicial and congressional attention increasingly turned toward problems of segregated schooling in the North and West. As a factual matter, patterns of racial identifiability of school populations and faculties in many northern and western school districts were comparable to those in the South; as a legal matter, however, the situation was more complicated. Specifically, the

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[6] Singleton also set forth explicit criteria for the use of non-racial, objective criteria in situations of reduction of staff following school consolidations or demotions or dismissals in order to protect individual black faculty members during the desegregation process.

[7] The combined impact of the Supreme Court's forceful mandate in Green and the implementation of Title I of the Office of Civil Rights (OCR) of the U.S. Department of Health, Education and Welfare was dramatic. Although 99 percent of black students in the states of the old Confederacy were still attending all-black schools in 1963, by 1972 the figure was 8.7 percent. G. Orfield, The Reconstruction of Southern Education (1969), p. 23; Rabkin, The Office for Civil Rights in The Politics of Regulation (J. Wilson, ed., 1980, p. 338).

problem faced by the lower federal courts in the North and West was how to apply the mandate of Brown to settings where historically separate schools had not been mandated by state law.

Emphasizing the Supreme Court's statement in Brown that "separate educational facilities are inherently unequal," some courts held that schools which were de facto segregated, for whatever reasons, violated the Constitution and must be eliminated.[8] Other courts, however, determined that racial imbalances in student and faculty populations per se should not be considered illegal, absent a showing of some intentional (de jure) actions by school or state officials that caused the segregation.[9] These differences in the lower court rulings were finally resolved by the U.S. Supreme Court's decision in Keyes v. Board of Education, 413 U.S. 189 (1973). Analyzing in depth the racial patterns in the Denver school system, the Court there made clear that school officials in the North would be held accountable only for de jure, but not de facto segregation. However, the Court also eased plaintiff's burden in proving the existence of de jure segregation since it held that

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[8] See, e.g., Oliver v. Kalamazoo Board of Education, 346 F.Supp. 766 (W.D. Mich. 1972), aff'd, 448 F.2d 635 (6th Cir. 1971) (affirming order for preliminary injunction); Jackson v. Pasadena City School District, 382 F.2d 878, 882 (1963) (Sup. Ct. Cal. 1963); Johnson v. San Francisco Unified School District, 339 F.Supp. 1315 (N.D. Cal. 1971); Spangler v. Pasadena City Board of Education, 311 F.Supp. 501 (C.D. Cal. 1970).

[9] See, e.g., Davis v. School District of the City of Pontiac 443 F.2d 573 (6th Cir. 1971); United States v. School District 151 of Cook County, Ill., 286 F.Supp. 786 (N.D. Ill. 1968), aff'd 404 F. 2d 1125 (7th Cir. 1968); Downs v. Board of Education of Kansas City, 336 F.2d 988 (10th Cir. 1964); Booker v. Special School District No. 1, 351 F.Supp. 799 (D. Minn. 1972).

proof of intentional segregatory acts in one part of a school system will establish a presumption that the entire system is de jure segregated, in the absence of conclusive evidence to the contrary.

Following Keyes, the courts' main concern in northern desegregation cases was to determine whether patterns of racial imbalance resulted from "neutral" factors such as individual residential housing preferences, or from specific actions of school district officials which were indicative of intentional efforts to assign students and faculty in a segregated manner. Among the main indicia of such discriminatory intent emphasized by the courts were use of zoning and school construction site selection policies that fostered racial imbalance, transfer policies that permitted white flight from "transitional" schools--and patterns of racial imbalance in faculty assignments. The courts gave faculty racial imbalance substantial weight in these assessments, for the reasons stated by the Ninth Circuit Court of Appeals in Kelly v. Guinn, 456 F.2d 100, 107 (1972):

> Teacher assignment is so clearly subject to the complete control of school authorities, unfettered by such extrinsic factors as neighborhood residential composition, or transportation problems, that the assignment of an overwhelming black faculty to black schools is strong evidence that racial considerations have been permitted to influence the determination of school policies and practices.

Application of these standards to a wide variety of northern and western school districts during the 1970s resulted overwhelmingly in findings of discriminatory intent whenever integration was

seriously pursued.[10] Examples of the types of faculty imbalance considered unacceptable by the courts were situations were 80 percent of black teachers were in majority black schools (Kelly v. Guinn, supra), where 75 percent of the black teachers were in schools that were 50 percent or more black (Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass.), aff'd sub nom, Morgan v. Kerrigan, 509 F. 2d 580 (1st Cir. 1974), cert. denied, 421 U.S. 963 (1975), and even where, in a district with 10 percent black students, 61 percent of black elementary school teachers were in 14 elementary schools, each of which had over 15 percent black students. Booker v. Special School Disrict No. 1, 351 F. Supp. 799 (D. Minn 1972).[11]

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[10] G. Orfield, Must We Bus? (1978, p. 24). The Supreme Court's 1979 decisions in Dayton Board of Education v. Brinkman, 443 U.S. 526 and Columbus Board of Education v. Penick, 443 U.S. 449 further complicated school districts' likelihood of justifying patterns of racial imbalance since the Court in these cases made clear that if a school district anywhere in the country was operating on a dual basis at the time of the Brown decision (whether or not such practices were specifically mandated by state statutes), it had an affirmative duty to take steps to eliminate vestiges of the dual system or at least to show that current racial patterns do not reflect the impact of the pre-1954 policies.

The type of faculty practices considered unacceptable under the Dayton/Columbus standard was illustrated by Adams v. United States, 620 F. 2d 1277 (8th Cir. 1980) where the Court noted that in St. Louis since 1962 11 new schools had opened with 100 percent black faculties, 4 with 100 percent white faculties and only 4 with racially balanced staffs.

[11] A notable exception to the general correlation in court decisions between findings of de jure student segregation and findings of discriminatory intent in faculty assignment practices was the Detroit desegration case, Bradley v. Milliken, 338 F. Supp. 582 (E.D. Mich. 1971), aff'd 484 F. 2d 215 (6th Cir. 1973), reversed on other grounds, 418 U.S. 717 (1974). There, although the court found intentional discrimination based on zoning, school construction, and other practices of the Board of Education, it explicitly held that the school district's hiring and faculty assignment policies were not discriminatory and refused to mandate forced transfers to

Where unacceptable statistical imbalances were found, the courts usually ordered prompt remedial action. Most school districts found faculty desegregation mandates more palatable than student desegregation orders. (See, e.g., Keyes v. School Disrict No. 1, Denver, Colo., 521 F.2d 465, 484 (10th Cir. 1975). But some argued vociferously that conditions in the North differed from those in the South and that, at times, assigning extra minority staff to minority schools was a sincere, enlightened attempt to provide "role models" that would inspire achievement by minority students. However, these "role model" arguments were consistently rejected by the courts. See, e.g., Morgan v. Hennigan, supra; Arthur v. Nyquist, 429 F. Supp. 206 (WD. N.Y. 1977), aff'd 573 F. 2d 134 (2nd Cir. 1978).

The judicial remedies oredred to correct these imbalances tended to be straightforward--especially in comaprison with the

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achieve Singleton ratios.

Among the key facts which influenced this decision were findings that the Detroit school system had implemented strong affirmative action policies designed to achieve racial balance in instructional staff which resulted between 1960 and 1970 in an increase in black representation among its teachers from 23.3 percent to 42.1 percent and among its administrators from 4.5 percent to 37.87 percent. The court further noted that Detroit had a higher proportion of black administrators than any other city in the country; that it employed black teachers in a greater percentage than the percentage of adult black persons in the city; that teacher transfers were not granted in the Detroit school system unless they conformed with the balanced staff concept; and that from 1963 to 1970, the number of schools with less than 10 percent black teachers decreased from 99 to 12.

One technique the Detroit board utilized to attain these results was to hold open hundreds of positions in schools with less than 25 percent black staff, rejecting white applicants for these positions until qualified blacks could be found and assigned. The court also noted that community pressures to assign male black administrators to black schools to serve as role models were rejected, where inconsistent with the balanced staff concept.

complexities of rezoning and mandatory busing involved in correcting student racial imbalances and student populations. As a rule, the courts in the nothern and western cases either required each school in a district to move towards a faculty racial population "substantially similar" to that in the system as a whole (See, e.g., Davis v. School District of the City of Pontiac, 443 F.2d 573) (6th Cir. 1971), or, specifically, within a range of approximately 5 percent in accordance with the Singleton ratio utilized by the Courts in the southern desegregation cases. See, e.g., Armstrong v. Board of School Directors, 471 F.Supp. 827 (D. Wis. 1979), aff'd 616 F. 2d 305 (7th Cir. 1980).

OCR'S IMPLEMENTATION OF FACULTY DESEGREGATION REQUIREMENTS

The greatest confrontations over issues of faculty desegregation occurred not as a result of court decrees, but in the wake of administrative enforcement activities.[12] Ironically, it was

[12]These enforcement activities grow out of Title VI of the 1964 Civil Rights Act, 42 U.S.C. §§2000d-2000d-4 (1976), which prohibits discrimination on the grounds of race, color, or national origin in programs that receive federal funds. Congress directed each federal grant-giving agency or department to establish rules and procedures to implement this prohibition. In the Department of Health, Education and Welfare (and subsequently in the Department of Education) this responsibility was largely delegated to the Office of Civil Rights (OCR). OCR also came to play a key role in determining whether school districts that applied for desegregation grants under the Emergency School Assistance Act of 1972, 20 U.S.C. 1601-1619, satisfied that Act's stringent eligibility standards regarding racially inbalanced faculties. OCR investigations and enforcement proceedings could lead to the termination of all federal funding to an offending school district, or to the rejection of an application for desegregation funds. Such proceedings were initiated either by the filing of administrative complaints with OCR by affected individuals or advocacy groups, or by the determination of an agency-initiated "compliance review" that civil rights violations were occurring. See Block, (1983).

cities where there had been no court findings of intentional discrimination, and no federal court decrees requiring mandatory student desegregation, that were subjected to the strongest enforcement pressures to achieve prompt compliance with the Singleton standard, through the forced transfer of hundreds of teachers. The double irony of this situation is that these stringent faculty desegregation enforcement initiatives originated with OCR during the Nixon years, at a time when the Administration's general posture was to moderate enforcement of the civil rights laws.

In the early 1970s the Nixon Administration's civil rights policy clearly sought to slow the pace of forced school desegregation in the South and to limit the use of mandatory busing everywhere. As a result, OCR's enforcement staff, which, as indicated above, had been vigorous and highly successful in pressing for rapid desegregation of southern school districts in the late 1960s began to turn its attention toward other areas of civil rights enforcement which would not be affected by these policy dictates.[13] Consequently, problems of faculty segregation, which could be remedied without the

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[13]The effect of the Nixon Administration's change in policy on OCR's activities was dramatic. Between July 1964 and March 1970, OCR had initiated approximately 600 administrative proceedings--in 1968 and 1969 they were being commenced at the rate of 100 per year. However, between March, 1970, and February, 1971, OCR commenced no new proceedings whatsoever. Similarly, whereas 44 districts had been subjected to fund terminations in 1968-69, there were only two such terminations in 1969-70 and none during the next three years. Adams v. Richardson, 351 F. Supp. 636, 640 (D.D.C. 1972).

use of forced busing and which occurred in the North and West as well as the South, became a prime focus of OCR's enforcement activities.[14]

OCR's analysis of faculty assignment data tended to reveal substantial patterns of racial imbalance in the teaching and

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This pattern of inaction led a group of civil rights attorneys to initiate an unusual lawsuit against HEW, charging that the Department had violated Title VI by abandoning on a wholesale basis any serious attempt to enforce the statute. In 1973, the United States District Court for the District of Columbia issued a decision in this case upholding their claims. Adams v. Richardson, 351 F. Supp. 636 (D. D.C.), 356 F. Supp. 92 (D. D.C.), aff'd 480 F. 2d 1159 (D.C. Cir. 1973).

The pressure from the court in Adams, and a companion litigation concerning enforcement of civil rights statutes in northern and western school districts, including several large cities, compelled OCR to continue active civil rights enforcement, at least in certain areas, despite the Administration's contrary policy preferences. See Brown v. Weinberger, 417 F. Supp. 1215 (D.D.C. 1976), aff'd sub nom. Brown v. Califano, 627 F. 2d 1221 (D.C. Cir. 1980). These judicial pressures were not completely unwelcome to those career OCR officials who personally had chafed under the Administration's enforcement limitations.

[14] Investigation of faculty segregation problems occurred in many of the large cities in the context of broader investigations of possible discrimination affecting students in areas less politically sensitive than basic student desegregation. Some of these areas were comparability of resource allocation, intraschool student assignment ("tracking") practices, and limitations of opportunities for non-English speaking students. These issues also applied nationwide and would not involve forced busing. Analysis of both student and faculty racial imbalance statistics also was a regular part of OCR's review of school district eligibility for ESAA funding. (See discussion at pp. 16-17 below.)

A detailed discussion of the "Equal Educational Opportunity Reviews" and their relationship to the faculty desegregation issues is contained in M. Rebell and A. Block, Equality and Education: Federal Civil Rights Enforcement in the New York City School System (forthcoming, Princeton University Press, 1984).

administrative staffs of the large city school districts. For example, in New York in the mid-1970s, when approximately 11 percent of the teaching staff was minority, 82 percent of the minority teachers were assigned to schools having 84 percent or more minority enrollment; 15 percent were assigned to schools where minority enrollment was under 35 percent (OCR letter of findings, November, 1976).

Although they generally acknowledge the validity of such statistical patterns, school district officials in the affected cities vociferously denied that these patterns resulted from any intentional de jure segregatory acts. Despite these denials, however, they entered into negotiations with OCR and eventally agreed to the terms of "voluntary" compliance agreements which required them to take strong, prompt, specific action to assure compliance with defined numerical goals.

Why did each of the large city school districts enter into such agreements in the absence of judicial findings of intentional discrimination? (At the least, insisting on a judicial finding would have delayed the necessity for swallowing highly distasteful medicine for several more years.) The answer to this question lies in the two strong sanctions that OCR was able to wield even in the absence of any judicial findings or court orders. The first was the threat of invoking the ultimate Title VI sanction: termination of all federal funding to the school district. Second was OCR's ability to cause the immediate withholding of millions of dollars in federal funds

which otherwise would be available to each of these school districts under the Emergency School Aid Act (ESAA), a statute which provided substantial aid to most school districts for broadly defined desegregation projects, but which explicitly precluded funding for school districts which engaged in practices that resulted in the segregation of students or faculty--whether or not these results stemmed from intentional discriminatory acts.[15]

OCR's consistent position throughout the 1970s was to insist that patterns of racial imbalance in school staffs must be remedied by prompt action to achieve immediate compliance either with the Singleton standard or with the standards set out in federal regulations for waiver of ineligibility under ESAA.[16] Where adherence to the Singleton standard could not

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[15]Although liability under ESAA may be based on discriminatory impact without a showing of discriminatory intent, Board of Education, New York City v. Harris, 444 U.S. 130 (1979), it was not clear at the time whether there could be a finding of liability under Title VI without a finding of intentional discrimination. Comp. Lau v. Nichols, 414 U.S. 563, 568 (1974), with Bakke, supra. In its complex recent decision in Guardians Association v. Civil Service Commission of the City of New York, 103 S. Ct. 3221 (1983), a 5-person majority of the Supreme Court held that liability could be found based on discriminatory impact alone, although the opinions differed on whether the valid source of the requirement was the Title VI statute or its implementing regulations.

[16]The ESAA standard found in 45 C.F.R. 185.44.d.3 (1973), provided that the racial composition of faculties could not vary more than a range 75 percent/ 125 percent of the systemwide composition of the teacher corps. For example, in a system with 10 percent minority teachers, the composition of individual schools could range from 7.5 percent to 12.5 percent minority. In small school districts with few minority teachers, where the gain or loss of a handful of teachers could change the percentages

be achieved by other means, mandatory transfer and reassignment of teachers and administrators would be demanded. A discussion of the negotiation and implementation of OCR's faculty integration agreements in four major cities, Los Angeles, Chicago, Philadelphia, and New York, will illustrate the extent to which OCR was able to impose these policies in each of these school district and the impact of their implementation on the affected teachers and schools.[17]

Los Angeles

In January, 1975, in connection with a pending application for ESAA funding, the Los Angeles Board of Education adopted a voluntary staff integration plan which, over the course of the next year, reduced the number of one-race schools from 71 to 5 and increased the number of schools meeting a stated criterion of a 15 percent to 50 percent minority to majority ratio from 228 to 323 (the minority percentage, districtwide, was approximately 30 percent). (Los Angeles Unified School District,

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ages substantially, OCR might allow a variation in absolute terms of one, or perhaps two, teachers from the norm in a given school even if the Singleton or ESAA standard was not technically met.

Which standard is stricter--Singleton or ESAA--depends on the systemwide percentage of minorities in a given school district as illustrated in the chart set out on the next page.

[17]The research for these case studies was undertaken under a grant from the National Institute of Education in connection with the research project reported supra, n. 14. Contractors undertaking such projects under government sponsorship are encouraged to express their professional judgment freely in the conduct of the project. Points of view or opinions stated there (and in this article) do not, therefore, necessarily represent official NIE positions or policy.

Table 1

Comparison of Singleton and ESAA Standards

Standard	ESAA	Singleton
% Minority Teachers	75/125%	+5%
40%	30-50	35-45
10%	7.5-12.5	5-15

Office of the Superintendent, Memorandum No. 46, May 25, 1976.)

OCR, however, found this plan unacceptable for the following reasons:

1. The plan depends primarily upon the assignment of new teachers, the occurrence of unscheduled leaves of absence, and the voluntary transfer of faculty to desegregate the faculties of your schools. We have found from past experience with other districts that such efforts must in most cases be coupled with involuntary reassignments in order to ensure that effects of past discriminatory staffing practices are overcome, and

2. The timeframe (five years) does not meet the current legal requirements.[18]

After further discussions and correspondence, OCR notified the Board on May 5, 1976, that if an acceptable plan to remedy the violations was not received within 30 days, administrative enforcement procedures would be commenced. The district's initial reaction was to propose that staff balance ratios of 15 percent to 50 percent in each school be established for 1977-78 and a 20 percent to 40 percent range for the year after. The district also asked whether teachers whose assignment is predicated on unique educational expertise could be exempted from the mandatory aspects of the program. OCR accepted the proposed ratios--even though they provided a 10 percent disparity range from the districtwide ratios in lieu of the Singleton standard's 5 percent range--but insisted on a more rapid implementation schedule, requiring partial compliance

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[18]Letter from Lloyd L. Pierce, Director, OCR Region IX, to William J. Johnson, Superintendent of Schools (Apr. 7, 1975).

for the coming school term and full compliance the year after.

The detailed plans which were formulated by the school district over the next two years to meet OCR's timetable contained both voluntary transfer and backup mandatory transfer components. In order to provide incentives for voluntary transfers, teachers were offered the following inducements:

1. A written guarantee of a right to return to his or her home school after four semesters of service. (Teachers transferred under the mandatory scheme would have no such return rights.)

2. A right to specify five particular schools to which he or she desired to be transferred. (However, the teacher would also have to be available for transfer to certain other schools if there were no vacancies in the designated locations.

3. Priority status for summer school employment opportunities.

4. Special consideration for promotional examinations.

5. Oportunities to enroll in a special masters degree program in urban education with emphasis on multicultural education.[19]

If the voluntary program did not result in a substantial enough number of transfers to meet the compliance goals, mandatory reassignments would automatically be instituted. The mandatory transfer scheme implemented during the first year was built around complex procedures for school matchings and a

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[19] In addition, under a special program known as the Urban Classroom Teachers Program, developed as part of the student desegregation plan in a related state court desegregation case, see Crawford v. Board of Education, 551 P.2d 28 (1976), teachers who agreed to staff certain core urban schools were provided incentive pay increases of approximately 11 percent (ostensibly in consideration for extra hours of teaching time).

random selection process which included all teachers in the school, regardless of seniority, except for probationary teachers with less than three years' experience at the particular school and teachers over age 60. (In addition, teachers of special education, bilingual education, and certain speciality areas were exempted.) In addition, principals would have the option to request exemptions for up to a maximum of 25 percent of the number of teachers remaining after all other exemptions had been taken "based on the instructional needs of the school." Los Angeles Unified School District, Office of the Superintendent, Memorandum No. 46, May 25, 1976, p. 7. Appeals by individual teachers were permitted based on medical and hardship factors. (Hardships could include extensive distance to be traveled, a major factor in the L.A. area, especially or single parents who were heads of households.)

The basic plan was modified somewhat prior to the second year of its implementation in 1977-78. The major change was the substitution of a seniority order transfer scheme for the prior random selection process. Every teacher in the school district was given a seniority ranking number. Teachers at each school were to be listed in inverse order of seniority and transfers were then effected under a complex, tripartite scheme that first matched various imbalanced schools and then drew from supplementary pools of additional potential transfers to "facilitate matching and compensate for attrition." Teachers with less than five years' assignment at the location

would be exempted from transfer unless an insufficient number of teachers were drawn from the three primary pools. The plan specified that, in general, transfers would take place during the first four weeks of each school term. It noted, however, that "teacher integration will take place on a continuous basis, and transfers may be made at other times during the school year." Los Angeles Unified School District, Office of the Superintendent, Memorandum No. 36, May 23, 1977, p. 14.

Implementation of the plan during its first year resulted in approximately 400 mandatory transfers, plus an additional approximately 1,250 assignments of new teachers, teachers returning from leave, and so forth, which in some sense might be said to have been nonvoluntary. According to administrators and union officials involved in the process, implementation was accompanied by serious morale problems the first year. "Parents marched, teachers resigned, people cracked up. There was a big rise in workman's compensation claims."[20] However, imple-

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[20]Interview with Sam Kresner, Director of Staff, United Teachers of Los Angeles (Jan. 28, 1983). UTLA, the main (though, under California's "meet and confer" laws, not the exclusive) teachers' union, decided from the outset of the negotiations with OCR not to oppose teacher integration as a concept. According to Mr. Kresner, although UTLA was bothered by the mandatory nature of the agreement, they decided to accept the concept as given and put their main efforts into trying to amend the plan to include a seniority orientation and otherwise to improve the implementation details. (Among the various Los Angeles teachers' unions, UTLA was considered the most liberal. It had always had strong representation of minorities among its members and had an active black membership caucus.) UTLA's willingness to cooperate with the board in implementing the plan was, however, met with solid opposition from other, smaller teacher groups. One of these filed a case

mentation of the seniority order system in the second year combined with an expansion of the procedures and incentives for voluntary transfers (which almost totally eliminated the need for mandatory transfers) appeared to have regularized the process and lessened the level of resentment and resistance. (Of course, much of the incentive for "voluntary" transfers obviously came from the fact that those who did not volunteer might well find themselves the subject of mandatory transfer.)

A statistical analysis of the impact of the teacher integration plan was prepared by Dr. Robert E. Searle, Administrator, Personnel Division, in April, 1981. It concluded that over the five-year period since initiation of the plan, more than 8,500 teachers were transferred in accordance with its guidelines. The report alleged that as a result of these transfers, teacher resignations and retirements more than doubled in 1977-78 and tripled in 1978-79. Teacher turnover at mid-city schools averaged 35 percent to 40 percent. The report concluded:

> As a result of teacher transfers required to meet OCR goals and subsequent teacher attrition, mid-city schools experienced: transfer of significant numbers of experienced minority teachers; loss of key instructional personnel; accelerated rates of attrition among non-minority teachers transferred in; unfavorable ratios of substitute to contract teachers

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in federal district court opposing the agreement. The court ultimately upheld the validity of the plan. Zaslawsky v. Board of Education of the Los Angeles City Unified School District, 610 F.2d 661 (9th Cir. 1979).

and large numbers of unfilled positions.[21]

Despite its substantial impact, there were indications that the L.A. transfer plan did not fully meet the percentage goals required under the agreement with OCR. For example, in 1980, the District admitted that 83 schools were out of compliance and in 1981, that 72 schools were out of compliance. On several ocasions, beginning in 1977, the District requested exemptions to permit, at least on a one-year basis, a broadening of percentage goals to a 20 percent to 50 percent range. These were rejected by OCR, although exceptions were permitted for a number of specific schools.

Chicago

Active involvement of the federal government in faculty desegregation matters in Chicago began on July 9, 1969, with a letter from the Department of Justice informing the Chicago Board of Education that examination of certain data had led the Department to conclude "that the school system's policies with respect to the assignment and transfer of faculty and staff members has had the effect of denying Negro students in the Chicago Public Schools the equal protection of the law."[22]

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[21]The conclusions of this report, written at a time when the Los Angeles Unified School District was in the midst of a politically charged desegregation battle, cannot, of course, be considered neutral findings. Rapid demographic changes in the district would undoubtedly have resulted in many white teachers being assigned to minority areas even without OCR pressures.

[22]Letter from United States Department of Justice to Chicago Board of Education (July 9, 1969).

The Board denied the charges of de jure segregation but it nevertheless entered into negotiations with the Department and later with HEW.

Approximately two years after this negotiating process had begun, the Board approved a plan to "Integrate School Faculties and Equalize Per Pupil Costs." Among its main features were goals to balance faculties so that "In schools in which more than 50 percent of the faculty is black, no more than 75 percent of its teachers shall be black" (Chicago Public Schools, Integrating Faculties and Provisions of Equally Effective Educational Services, July 1969-1976, annexed to Plan for the Implementation of the Provisions of Title VI of the Civil Rights Act of 1964 Related to Integration of Faculties, Assignment of Principals, Bilingual Education Programs, May 25, 1977, p. 61) and, similarly, in majority white schools at least 25 percent of the teachers would be black. The Department of Justice rejected this plan, holding that it did not meet the requirements of federal desegregation law. But the federal authorities did little over the next two years to follow up on their rejection.

Early in 1975, however, the Board was informed by the United States Office of Education that its application for ESAA funding was being denied because of discriminatory assignment of teachers and discrimination against national origin minority children. After several meetings between the Board and OCR officials, a new plan was adopted by the Board in February of

1976, the key provision of which was that by September 1977:

> At least 80 percent to 85 percent of the schools will have a ratio of nonminority teachers to minority teachers or minority teachers to nonminority teachers between 30 percent and 70 percent. Id. at 67.

At that time, the racial composition of the schools was to be further analyzed and additional steps taken if necessary to enhance integration. In addition, the plan promised to assign all new teachers to schools "In such a way that the nonminority/minority representativeness of the teaching staff will be enhanced or maintained." Id. at 67. Furthermore, no assignments were to be made from the transfer list set forth in the collective bargaining agreement with the Chicago Teachers' Union for the next three years, except for voluntary transfers made to enhance integration.

OCR rejected this plan and, shortly thereafter, initiated administrative proceedings against the Board for noncompliance with Title VI. On February 15, 1977, the administrative law judge issued a decision upholding OCR's position on the faculty assignment issues. The decision determined that the Board was guilty of intentional segregation in regard to teacher assignments, noting that in this area the Board had complete control and that statistical testimony indicated that the chances of the assignment patterns at issue being random were "one in a million." Matter of Chicago Public School District #299, Dct. No. 5-120, Admin. Proc., Dept. of HEW (February 15, 1977). The administrative law judge ordered termination of federal funding

for all education programs "infected" with noncompliance (which included most bilingual programs, many Title I programs, NDEA vocational education, Title II library assistance programs, etc.).

At this point, an intensive six-month negotiating process commenced. It led to implementation of a detailed agreement and the transfer of approximately 1,300 teachers and 80 principals by the start of the next school year. The key element of the final plan which emerged from this process was a commitment that the faculties in the Chicago public schools would be integrated by the next September so that:

1. The racial/ethnic composition in each school would be

   --no more than 65 percent non-minority and no less than 40 percent non-minority

   --no more than 60 percent minority and no less than 35 percent minority

2. The percentage of experienced teachers in each school would be between plus or minus 12 percent of the system-wide percentage of experienced teachers for each school.

3. The range of educational training of the faculty in each school would be substantially similar to the range in the system as a whole.

In addition:

1. The percentage of minority principals assigned to non-minority schools shall be the same as the percentage of minority principals assigned in the system as a whole, provided that there shall be a fair distribution of minority principals assigned to schools of high non-minority student enrollment.

2. The percentage of non-minority principals assigned to minority schools shall be the same as the percentage of non-minority principals assigned in the system as a whole.

3. The percentage of female principals in each administrative grade is essentially the same. Plan for the Implementation of the Provisions of Title VI of the Civil Rights Act of 1964 Related to: Integration of Faculties, Assignment of Principals, Bilingual Education Programs, p. 7 (October 12, 1977).

The significance of the basic 65 percent-40 percent and 60 percent-35 percent faculty assignment ratios in this plan can be understood in reference to the systemwide racial ratios as of April, 1977, which were 54.3 percent majority and 45.7 percent minority. Thus, the 65 percent-40 percent range for white faculty members meant, in essence, a deviation from the 54.3 percent citywide average of 10.7 percent on the up side and 14.3 percent on the down side. In regard to non-minority teachers, the ranges were 14.3 percent on the up side and 10.7 percent on the down side. Again, therefore, OCR accepted disparity ratios greater than both the Singleton 5 percent standard apparently in exchange for a commitment to immediate implementation of the agreed ratios.

The plan anticipated that immediate compliance could only be achieved through mandatory transfers. These were to be accomplished through a complex seniority scheme for which the teachers union[23] had pressed. All teachers were organized

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[23]The Chicago Teachers Union was consulted extensively by the school district's representatives in the negotiations with OCR. The union was not happy with the mandatory transfer approach, but after its efforts to exert political influence on the process failed, it worked with the board on the implementation details; seniority protection was its major concern. (Interviews with Robert M. Healey, President, Chicago Teachers Union (January 7, 1982); Conrad Harper, Esq., Consultant and Chief Negotiator for OCR (October 22, 1981).

for the purposes of the plan into seniority categories. Random numbers were assigned to each teacher within each seniority grouping to determine who would be transferred. When transfers were called for, they would be made from the lowest seniority group level first.

Teachers selected for movement were matched with other teachers on the basis of race (non-minority with minority), experience, distance, and training levels. Teachers 55 years or older were exempt from selection for transfer or reassignment unless it was not possible for a school to be brought into compliance with such exemptions. Further exemptions were available for special programs and needs if appropriately qualified staff were not available to maintain the integrity of those programs.

The plan was implemented in "two passes" during the summer of 1977. It was an enormous job. Mass computer programming of seniority calculations and other characteristics of all teachers in the system had to be undertaken. Joan Raymond, the assistant superintendent in charge, called the process "a monstrosity."[24] Initially letters went out to 1,706 teachers informing them that they were slated for mandatory transfer. Appeal procedures

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[24]Interview with Joan Raymond (Dec. 7, 1981). Dr. Raymond took professional umbrage at having been compelled by OCR to rush through full implementation on only several months' notice. She said she had warned them that "they would destroy the system. In the end, many scars were left." She thought it an unnecessary upheaval because the same results could have been achieved on a phase-in basis.

were permitted based on program needs, hardship, or error. Almost a thousand cases were appealed, and of these 349 were granted (more than a third based on "error"). Because more mandatory assignments were needed after these appeals, a second pass was instituted, resulting in transfer notifications to 442 additional teachers (and further appeals by them).[25]

Implementation of this massive mandatory transfer plan in the fall of 1977 resulted in substantial compliance with the stated goals. From time to time in later years, OCR alleged that certain schools were no longer in compliance with the agreement. Negotiations resolved most of these problems, although in September, 1981, another approximately 150 teachers had to be mandatorily transferred.

Philadelphia

In the spring of 1978, the Philadelphia school district applied for a substantial ESAA grant in order to obtain funds to effectuate a desegregation plan to which it was committed in a state court litigation. School district officials had expected the ESAA application to be processed and approved quickly, largely because they had previously entered into a consent agreement with the Pennsylvania Human Relations Commission to remedy faculty desegregation problems and they had scrupulously complied with that agreement. (That plan

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[25]There were also appeal procedures and exemptions for the principals' assignments. In all, 80 out of 537 principals in the system were transferred.

involved voluntary transfers aimed at assuring at least 10-20 percent minority teachers in each school.)

However, on June 22, 1978, Philadelphia's school superintendent received a letter from the United States Office of Education stating that the district was not eligible for an ESAA grant because:

> The district's teaching staff is 63 percent white, 36 percent black and 1 percent other minority group members...60.7 percent of the district's black teachers are assigned to the 114 schools (41 percent of the district's schools) with 90 percent or higher black student bodies. Furthermore black teachers are assigned to predominantly white schools in proportions well below their representation district-wide. Only 8.4 percent of the district's black teachers are assigned to the 62 schools (22 percent of the district's schools) with 80 percent or higher student bodies [sic].[26]

After an attempt to change OCR's position at a show cause hearing proved futile, the school district quickly agreed to comply with OCR's requirements in order to obtain the vitally needed ESAA funding for the fall term. These requirements were that by September all schools in the district would precisely reflect the 75 percent/125 percent ESAA standard, i.e., a minority population in the range of 27 percent-45 percent. Rather than a formal plan, the method utilized to achieve these

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[26]Letter from United States Office of Education to Philadelphia School Superintendent (June 22, 1978). OCR apparently rejected the district's reliance on the Human Relations Commission's guidelines because between the time of their establishment and the time of OCR's investigation, the percentage of black teachers in the district had risen from 28 percent to approximately 36 percent and modifications which should have been made to reflect these changes had not been undertaken.

results essentially consisted of modifications of teacher transfer provisions that had been put into the union contract in the late 1960s in order to comply with the Human Relations Commission's guidelines. Agreement between the Board of Education of the District of Philadelphia and Philadelphia Federation of Teachers, Local 13 American Federation of Teachers, AFL-CIO, September 1, 1980-August 31, 1982.

The contract defined both the acceptable racial balance ratios and the seniority order in which mandatory transfers would be made. The contract also listed certain incentives for voluntary transfers, including rights to return to original schools and the opportunity to take one-month summer courses at full pay.[27] Newly hired teachers were eligible for transfer at any time during the course of their first year, but more experienced teachers could be transferred only at the beginning of the year.

Implementation of the new transfer policies in the fall of 1978 required massive numbers of reassignments. The district officially reported to OCR that out of approximately 12,000 teachers, 1,008 white and 1,008 black teachers were transferred under the OCR agreement. (This was based on an estimate that

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[27] These were not, however, as extensive as were the comparable provisions in the Los Angeles plan. In choice of assignment and other areas, mandatorily transferred teachers would be given preference over voluntary transferees. The racial balance transfer aspects of the contract were complex because they were intermeshed with additional procedures for transfers resulting from reduced enrollments.

close to 50 percent of the overall total of 4,500 teacher transfers necessitated that fall were due to racial factors.) Needless to say, transfers of this magnitude, which dwarfed the mandatory transfer schemes in both Los Angeles and Chicago, had a major impact. School district officials, reflecting after the fact upon the problems they encountered, admitted that they had not anticipated how chaotic it would be. Chicago had taken the whole summer to work out computer runs in planning to transfer 1,700 teachers. In Philadelphia, a much larger number were moved on much shorter notice. Because of this pressure, many mistakes were made. In fact, the union brought a major arbitration claiming that, in a substantial number of cases, seniority had been miscalculated and the wrong people transferred. As a result of a favorable verdict for the union in the arbitration, many of these transfers had to be redone in February, creating more chaos and resentment among the teaching staff.

Philadelphia's racial balance plan has continued in effect since 1978. School district officials have estimated that in the second year there were about 1,000 moves, although no one was able to pinpoint precisely how many were actually required by racial balance as compared with enrollment decline needs. OCR officials acknowledge that the district has been fundamentally in compliance with the agreed goals since the first

year, even without an actual monitoring presence by OCR.[28] School district administrators have taken pride in the fact that after the first year, they "got the bugs out of the system" and now methods for calculating seniority and transfer rights are down to a science. "It all works rather auto matically now."[29]

Although, especially in the chaotic 1978-79 school year, the mandatory transfers had a substantial detrimental impact on teacher morale, Philadelphia school district officials expressed less resentment years after the process had been initiated then did their counterparts in Los Angeles. In fact, Murray Bookbinder, Executive Director of the Philadelphia Board of Education's Office of Personnel and Labor Relations stated that, "In the long run, this may have been a plus." He believes that attitudes toward integration of a large number of teachers had been favorably changed with the passing of time and the stabilization of the transfer system.[30] Consistent with Mr.

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[28]Interview with Theodore Nixon, Chief, Elementary and Secondary Education Division, OCR, Region III (Apr. 14, 1982).

[29]Interview with Michael Aaronson, Assistant to the Executive Director, Philadelphia Board of Education, Office of Personnel and Labor Relations (Apr. 14, 1982).

[30]Interview with Murray Bookbinder, Executive Director of the Philadelphia Board of Education's Office of Personnel and Labor Relations (Apr. 14, 1982). Mr. Bookbinder acknowledged, however, that these attitudes did not include all teachers, especially those white teachers with substantial seniority who had been compelled to transfer to black schools in "bad" areas. He also added that there may have been less attrition and negative faculty morale than in Los Angeles because high unemployment and declining school enrollments throughout the

Bookbinder's sentiments, the Philadelphia Board of Education voted to retain permanently the OCR percentage quota system, after being officially notified by OCR on June 23, 1982, that since school faculties had now been successfully integrated, its continuation was no longer legally required.[31]

New York[32]

Early in 1973, OCR commenced a massive investigation of several areas of possible discrimination against students in the New York City school system as the opening chapter of its "Big Cities Review" project. Although faculty segregation issues were not a prime focus of the investigation as originally conceived, this position was reconsidered in 1976 when, as a result of New York City's fiscal crisis, thousands of teachers were laid off and two major administrative class action complaints were filed with OCR charging the New York City Board of Education with employment discrimination.

Consequently, in November, 1976, when OCR issued the first of two letters of findings growing out of its years of investigation, the letter dealt exclusively with faculty discrimination

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area denied potentially dissatisfied teachers any alternative employment opportunities.

[31]This voluntary policy was declared unconstitutional by the United States District Court, for the Eastern district of Pennsylvania in Kromnick v. School District of Philadelphia 555 F.Supp. 249 (E.D. Pa. 1983). (This case is discussed in more detail in n. 34, infra).

[32]A full case study narrative and analysis of the events in New York is contained in Rebell and Block, supra, n. 14.

issues. OCR alleged New York discriminated both in initial hiring (largely because minority applicants tended to fail in disproportionate numbers a licensing examination mandated by state law, which OCR held was not properly validated), and in the assignment of teachers and administrators to particular schools in the city.

The Board of Education's response admitted the racial imbalance figures, but claimed that the inequities were caused by forces outside its control and its legal responsibility. Especially significant were the workings of an "alternative hiring system" which allowed schools with low average reading scores (mostly in minority areas) to hire teachers who had not passed the regular licensing exams or out of rank order from the lists of those who had passed. Although the alternative hiring system had been sought by minority groups to promote the hiring of minority teachers, it appeared also to result in an exacerbation of faculty racial imbalance figures.

The Board offered to commit itself to a voluntary "equal educational opportunity plan" which contained the following elements:

1. increasing employment opportunities for new teachers during a period of layoffs by promoting preretirement programs for older teachers and instituting work sharing programs

2. utilizing the opportunity created by the layoffs and attendant seniority "bumpings" to foster faculty integration

3. promoting voluntary transfers

4. seeking legislative changes to eliminate the rank order hiring requirements

5. granting hiring preferences based on job related factors that would improve opportunities for minority persons

6. initiating a research and development program to create a new "equitable, valid system for teacher certification and selection." Response of the Board of Education of the City of New York to the November 9, 1976 Letter from the Office for Civil Rights, United States Department of Health, Education and Welfare (April 22, 1977).

In its response, the Board specifically eschewed the use of any quotas and rejected the use of forced teacher transfers.

OCR's response, issued by David Tatel, its new director under the Carter Administration, was to insist on immediate implementation of the 5 percent Singleton standard by the beginning of the approaching school term, and to require that the Board of Examiner's tests and ranking procedures be validated in accordance with the guidelines of the federal Equal Employment Opportunity Commission.

A lengthy negotiating process ensued. The New York negotiations were more highly charged than those in other cities and, unlike the others, included the active participation of the teachers union. Although New York, (a Democratic Party bastion) and the teachers union, (whose leader, Albert Shanker, was also the national President of the American Federation of Teachers) certainly had better lines of communication to the Carter Administration than under the Ford Administration, OCR's legal position and its threat of sanctions (a possible Title VI

funding termination or denial of pending ESAA funding applications during a time of budgetary and fiscal crisis in the City) nevertheless gave the agency sufficient leverage in the negotiations to insist upon and obtain a compliance agreement of some substance.

The essence of this agreement was that the Board accepted OCR's 5 percent Singleton standard (compared to the 10 percent standard adopted in the other cities) but it was given substantial time and great latitude in methods to achieve the desired ratios. The specific references to immediate mandatory teacher transfers which OCR obtained in the Los Angeles, Chicago, and Philadelphia agreements were omitted in New York. (OCR officials asserted--but Board officials denied--that the Agreement implied that if compliance was not achieved by other means after three years, mandatory transfers would be effectuated.) Specifically, the agreement provided that:

1. Not later than September, 1979, the teacher corps of each district in the system will reflect, within a range of 5 percent, the racial-ethnic composition of the system's teacher corps as a whole for each educational level and category, subject only to educationally based program exceptions.

2. Not later than September, 1980, each individual school in the system will reflect within a range of 5 percent the racial-ethnic composition of the system's teacher corps as a whole for each educational level and category, subject only to educationally based program exceptions.

3. The Board of Education will demonstrate to the Office for Civil Rights, subject to prescribed review, that any failure to meet the commitments set forth in paragraphs 1 and 2 hereof result from genuine requirements of a valid educational program. In addition,

> the Board will demonstrate that it has made and is continuing to make special efforts to overcome the effects of educationally based program exceptions through effective use of such mechanisms as recertification, recruitment, and special assignment of teachers.[33] Memorandum of Understanding Between: The Board of Education of the City of New York and the Office of Civil Rights, United States Department of Health, Education and Welfare, (September 7, 1977).

Implementation of the teacher assignment provisions of the agreement began in September, 1977, shortly after the final version had been signed. Although no mandatory transfers were effected as in Chicago, Los Angeles, and Philadelphia, the Board was in the process of recalling many teachers who had been laid off during the fiscal crisis the year before, and it planned to reassign those teachers in a manner that would move the system toward compliance with the numerical goals of the agreement.

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[33] On the teacher hiring issues, the agreement contained the following key points:

a) Teacher licensing tests will be validated in accordance with "accepted professional standards";
b) Eligibility lists by license will be merged;
c) Rank ordering of persons on the list will be abolished;
d) Appropriate affirmative action mechanisms consistent with the above reforms would be developed and implemented.

The Board committed itself to sponsor and actively support state legislation providing the above changes in the licensing system. It also agreed to undertake a detailed study of "qualified labor pool" for pedagogical positions in the New York City area, committing itself to affirmative action hiring procedures that would ensure that the levels of minority participation in the teaching and supervisory service would be within a range representative of the racial and ethnic composition of the relevant qualified labor pool, as revealed by the study.

Accordingly, the Board's Office of Personnel set up a new procedure at its hiring hall. When a teacher's name was called, he or she would walk to the front desk where a personnel officer would visually categorize the individual by race, and then direct him or her to draw an assignment from one of two boxes. The first box contained all vacancies in schools which were "short" on minority teachers. The other contained vacancies in all the schools requiring more white teachers.

This racially oriented hiring hall procedure resulted in immediate expressions of outrage. Senator Daniel Moynihan (D., N.Y.) made an impassioned speech on the floor of the Senate, attacking OCR and the agreement and likening the mechanism for racial assignment to the practices of Nazi Germany. Shortly thereafter a number of community school board members, teachers, and supervisors filed a complaint in federal district court challenging the legality of the agreement. While that litigation was being pressed, further implementation of the agreement was delayed.

Implementation of the agreement commenced anew at the beginning of the 1978-79 school term with the lifting of an injunction in the court case,[34] although the controversial

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[34]The original injunction had been issued on the basis of the District Court's conclusion that the agreement was procedurally defective because the public was not consulted prior to its adoption. Caulfield v. Board of Education of the City of New York, 449 F.Supp. 1203 (E.D. N.Y. 1978). This finding was reversed by the Court of Appeals for the Second Circuit, 583 F.2d 605 (2nd Cir. 1978). On remand, after a full trial, the District Court held on the merits that OCR's findings were

hiring hall procedures were no longer utilized. A month after the September, 1980, faculty integration deadline, the Board of Education submitted a progress report to OCR which indicated that only 9 of the 32 community school districts had met the numerical goals and only 58 of 115 high schools in the city had faculty ratios in the permissible ranges. Schools Chancellor Frank Macchiarola explained to OCR that the Board had taken all reasonable steps short of mandatory transfers (including promoting voluntary transfers and monitoring community district "excessing" policies for integrative effect) and that to compel mandatory transfers at this time would cause massive disruption and would be particularly harmful to black faculty and students.[35]

The Chancellor continued to experiment with new techniques for increasing faculty integration. He adopted a regulation--

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plausible enough to justify acceptance of the remedies in the Agreement as a "voluntary" plan. The court explicitly stated that its review of the reasonableness of the factual basis to support a voluntary plan was less exacting than would be a de novo analysis by a Court to determine whether a violation of the Title VI had occured. 486 F.Supp. 862, 923-924 (E.D. N.Y. 1979).

[35]The Board's basic position was that at the time it entered into the agreement, it reasonably believed that its goals could be achieved by regulating the natural flow of teachers into vacancies in the system. The Board had planned on hiring substantial numbers of new employees over the next few years, but instead it was faced with frequent layoffs. Another key problem was that when the Board attempted to fill vacancies by recalling previously laid-off teachers, job offers were declined in large numbers. Former teachers had lost interest in employment in the city school system altogether or else would not teach in certain neighborhoods. (The Board reported, for example, that in order to fill high school vacancies in the Fall of 1979, there were many areas in which ten teachers would be assigned before one would accept the job).

the "80-20-80 formula"--which limited by race the prerogatives of community school districts to hire teachers under the Decentralization Law's alternative appointment system. He also made an attempt to limit teacher transfer rights under the union contract, but was overruled by a labor arbitration (which he did not appeal). United Federation of Teachers v. Board of Education, Opinion and Award, American Arbitration Association Case No. 1339-0485-80, other initiatives were the creation of a "district teacher reserve," and directives involving permanent reassigments and "temporary" appointments of regular substitutes in the community school districts.

In the wake of President Carter's electoral defeat in November, 1980, and the reassessment of civil rights policy by the new Reagan Administration, Chancellor Macchiarola made a formal request that the Board be deemed in compliance or that the agreement be renegotiated. In June, 1982, OCR responded informally by denying the request for modification and telling the Board it would have to implement mandatory teacher assignments. An outcry by the local press and politicians led to a series of negotiations held in the offices of Senator Alphonse D'Amato (R., N.Y.), and a reconsideration of the matter by Secretary of Education Bell.

The product of this reconsideration was the negotiation of a new agreement in November, 1982. The new agreement relieved the Board of substantial further mandatory compliance responsibilities. The Singleton 5 percent standard was enlarged to 15

percent and the benchmark figure was redefined to use boroughwide racial proportion figures instead of citywide percentages of minority teachers as the base. Consequently, in Staten Island and Queens where fewer than 15 percent of the teachers were minority, the new agreement theoretically would permit school faculties having no minority teachers at all. In the other boroughs, even if some schools did not meet the relaxed standards, the Board would be deemed in compliance if it had made "good faith efforts." Memorandum of Understanding Between: the Board of Education of the City of New York and the Office of Civil Rights, United States Department of Education, November, 1982. In response to these events, local civil rights advocates reactivated a dormant federal law suit against the Board and OCR, and in their new court papers demanded that the court set aside the 1982 agreement and force the Board to fully implement the terms of the 1977 agreement.[36]

CONCLUSION

In the classical era of the dismantling of dual school systems in the South, requirements for faculty desegregation developed as part and parcel of the basic remedies adopted to promote student desegregation. When these legal precedents were applied to the situation of the large urban areas in the

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[36]The case, New York Association of Black Educators II v. United States Department of Education, No. 77 C. 2531 (E.D. N.Y.), was still in discovery as of December, 1983, after the court had denied plaintiffs' motion for summary judgment the previous September.

North and the West in the 1970s, however, political developments led to abatement of enforcement pressures in the student desegregation area, but to accelerated enforcement of faculty desegregation. Thus, faculty desegregation standards were let loose from their traditional moorings and took on a life of their own.

OCR's development and implementation of the "isolated" faculty desegregation requirements provides significant remedial insights. The case study histories in Los Angeles, Chicago, and Philadelphia indicate that strong insistence on achievement of strict numerical balance ratios through mandatory transfers can result in thoroughgoing, stable integration, where no effective political opposition has been marshalled to oppose the process. Although there was substantial administrative disorder and undoubtedly a lowering of faculty morale, at least in the initial stages of implementation, compliance with the stated racial balances was promptly achieved. Union leaders quickly understood that their members, who were being subjected to the teacher equivalent of forced busing, could not marshall broad public support as have some opponents of student busing. Consequently, they concentrated on negotiating detailed improvements in the transfer plans rather than opposing them outright. An additional factor for the effectiveness of the teacher integration remedies was undoubtedly the absence of a "white flight" escape value because the teachers' investment in their present jobs and the lack of alternative employment

opportunities severely impaired their mobility. (Note in this regard that the most successful implementation took place in Philadelphia, where there were the fewest suburban jobs available to disaffected teachers.)

The effective enforcement of faculty desegregation requirements in these cities was somewhat anomalous from an educational policy viewpoint. There were no developed educational theory or evaluation studies advocating or demonstrating the merits of integrating teachers in contexts where student assignment patterns remained racially imbalanced. Under conditions of student imbalance, the clearest policy argument for faculty desegregation probably would be that children in predominantly white schools, who otherwise would experience all white faculties, would benefit from being exposed to black or Hispanic adults in professional and leadership roles. A strong countervailing problem, however, was that if there were not a major increase in the percentage of minority teachers among newly hired teachers, the faculty desegregation of virtually all white faculties would require the transfer of experienced black teachers out of schools located in minority neighborhoods. Many minority group advocates and educators want to retain large numbers of these teachers and principals to serve as role models for the minority students. Presumably because of these contradictory concerns, there was no active support by established civil rights advocacy groups for isolated faculty integration in any of the cities we studied. Thus, the administrative

enforcement process asserted itself without theoretical or political support.

In sum, then, the OCR case studies show that taking a single strand out of the constellation of factors that usually constitute the integration process and applying it in a setting relatively free from the resistance of "extraneous" political influences and "white flight" leads to a comparatively significant degree of compliance with stringent integration requirements. Of course, to fully assess the implications of these results, one would need to determine whether "effective" faculty desegregation was worth the price that was paid in terms of administrative disorder and lowering of faculty morale, and their presumed detrimental impact on the educational process. (One would also, of course, need to consider possible positive effects such as improved attitudes and performance by teachers and students alike.) Without evidence of substantial beneficial effects, the history of the implementation of isolated faculty desegregation efforts as OCR's priority issue arguably could be seen as amounting merely to a "conscience salve" for civil rights enforcers who were precluded from pursuing basic student desegregation initiatives.

OCR's intervention in New York City, which took a different course from that in the other cities, takes on added comparative significance from this perspective. On the one hand, OCR was less successful in obtaining full compliance with its faculty balance ratios. New York, in this sense, was the

exception that proved the rule concerning the impact of extraneous political influence. Greater political opposition in the bastion of Albert Shanker, National President of the American Federation of Teachers, led to a modified agreement which permitted a longer phase-in period and did not explicitly require mandatory reassignments. As a result, 5 years after the Agreement was signed, thoroughgoing compliance, which was long since achieved in the other cities, was still a distant prospect. Political pressures that had begun during the Carter Administration were finally acceded to by the Reagan Administration, resulting in the watering down and virtual abandonment of the basic agreement.

On the other hand, although the New York school system did not achieve full faculty desegregation, neither did it pay the price attendant upon mandatory transfers as did the other cities. Also, without major administrative upheaval, some substantial improvement in faculty racial balances did ensue.[37] Would this level of integration have been achieved without the background threat of mandatory reassignments? Was this level of improvement enough? And, even in New York, would more student desegregation have been attempted and achieved if

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[37]The Board claimed in 1981 a five year reduction of schools out of compliance with the 5 percent Singleton standard at the beginning of the term from 208 to 49 at the elementary level, and from 119 to 18 at the junior high level. (Table 1-3 annexed to letter dated July 9, 1981, from Chancellor Frank Macchiarola to Dr. Clarence Thomas, Director, OCR). There is no indication that OCR ever validated the accuracy of those figures.

there had been less focus for the past decade on the faculty issues?

The political changes that led to the final watering-down of the New York agreement, of course, were not an isolated phenomenon. They reflected the Reagan Administration's retrenchment on the utilization of numerical goals in areas of civil rights enforcement. Significant in this regard is the fact that the Education Consolidation and Improvement Act of 1981, 20 U.S.C. § 3832(3) and (7), repealed the Emergency School Assistance Act (and consequently, its detailed implementing regulations) and placed funds formally earmarked for desegregation aid under the ESAA into a general block grant appropriation.[38] (Repeal of ESAA not only removed one of OCR's major sanctions for pressing faculty desegregation requirements but also eliminated the specific numerical benchmark in the remedial standards of the ESAA guidelines.)[39]

Although the current administration's policy preferences are apparent, in the faculty assignment area the de-emphasis on

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[38] A bill has been introduced to re-enact ESAA as a separate categorical funding program (S. 402, 98th Cong., 1st Sess., Jan. 25, 1983).

[39] The Courts also seem to be moving away from strict reliance on numerical guidelines in faculty integration situations. Note in this regard the recent decision in Kromnick, supra, n. 31 in which the school district's decision to maintain a policy of strict adherence to numerical guidelines in faculty assignments on a voluntary basis after initial compliance with the ESAA requirements and the OCR compliance standards had been met, was invalidated by the court. See also, United States v. Texas Education Agency, 510 F.Supp. 994 (E.D. Tex., 1981), aff'd 679 F.2d 1104 (5th Cir. 1982), where disparities from the

numerical ratio mandates also reflects a markedly changed factual context. As a result of the enforcement pressures from the courts and OCR over the past decade, most school districts appear to have substantially improved their faculty racial balance figures. In fact, the OCR officials report[40] that they currently receive few complaints in the area of faculty assignments and it is their general impression that this no longer constitutes a major national compliance problem.[41]

To the extent that reduced enforcement focus on faculty integration reflects a widespread achievement of acceptable

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district-wide faculty racial ratio of 10 percent at the elementary and 15 percent at the junior and senior high school levels were held to constitute "substantial equivalency" under the Singleton standard.

Note also related trends in recent student desegregation cases in major cities affected by white flight, away from requiring achievement of systemwide racial ratios in each particular school in a school district (See, e.g., United States v. Board of Education of the City of Chicago, 554 F. Supp. 912 (D. Ill. 1983) (cour approves plan defining a school with 70 percent white population as "desegregated" in a city with fewer than 20 percent white students); Lidell v. Board of Education of the city of St Louis, 667 F.2d 643 (8th Cir. 1981), cert. denied, 454 U.S. 1091 (1981) (court approves plan defining a school with 30-50 percent black population in district as "desegregated" in a city which has 76 percent black students).

[40]Authors' telephone interviews with OCR regional attorneys in six representative regions around the nation (July, 1983).

[41]Of course, the demise of ESAA has removed the major investigative tool that OCR utilized to review racial disparity figures on a regular basis in most school districts. (Historically, there never were many citizen complaints about racial staffing imbalances). However, the fact that the Council of Big City Schools is vigorously lobbying for reenactment of ESAA indicates that these school districts do not fear renewed OCR investigations of their current faculty assignment practices.

racial balances, the irony of the isolation of faculty desegregation from the overall desegregation process becomes more apparent, since this achievement has taken place at a time when effective student desegregation in large urban areas seems an ever more distant prospect.[42] Whether, from a historical perspective, "isolated" faculty desegregation has a positive or negative influence on the larger desegregation picture, the present reality is that because of its "success" in the past as an isolated factor, pressures for thoroughgoing racial balance of school faculties in any given context are likely to be greater in the future than analogous pressures toward student desegregation.[43] (In most areas, of course, even where "white flight" has minimized the number of students available for citywide racial balancing plans, substantial numbers of white teachers remain to make full systemwide faculty desegregation a continuing feasible option.)

In short, where there is any significant pressure for civil rights enforcement in the public schools in the next

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[42]Compare in this regard the patterns of teacher integration in Chicago with the bleak student desegregation situation for a system with 17 percent white students, described by the Court in United States v. Board of Education, City of Chicago, supra n. 39.

[43]Note in this regard the interesting result in Alexander v. Youngstown Board of Education, 675 F.2d 787 (6th Cir. 1982) where the Court held that there had not been intentional segregation in the system as a whole, although it did find intentional segregation in faculty assignment policies. Accordingly, no plan for student desegregation was required, but the Board was ordered to submit a plan for the "expeditious, full elimination of the racial identifiability of the staff."

several years, it is likely that there will be an emphasis on the area of teacher integration, because of the existence of an established track record, and a clear legal and remedial methodology.[44] While this is particularly true for administrative enforcement, it also holds for the courts, where challenges by teachers to mandatory reassignment plans generally have met with little sympathy because teachers are presumed to have no legal rights to an assignment in a particular school.[45] Given these realities, school boards which seek to avoid the disruptive consequences of mandatory faculty transfer schemes might be well advised to monitor their assignment practices on a continuing basis and to take continuing "voluntary" measures to ensure maintenance of basic faculty balance ratios.[46]

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[44] Note in this regard that even under the conservative Reagan Administration (and at the same time it was renegotiating the New York City agreement), OCR completed a new faculty reassignment plan for the city of Trenton which required racial ratios for each school in the system within the range of 1-3 percent, an even stricter requirement than the traditional Singleton standard. (Trenton Board of Education, Two Year Desegregation Plan, April 20, 1982).

[45] See, e.g., Caulfield v. Board of Education of the City of New York, 486 F.Supp. 862, 925 (E.D. N.Y., 1979), aff'd, 632 F.2d 999 (2d Cir. 1980); Rodriguez v. Board of Education, Eastchester Union Free School District, 620 F.2d 362 (2d Cir. 1980); Zaslawsky v. Board of Education of Los Angeles City Unified School District, 610 F.2d 661 (9th Cir. 1979); Tangren v. Wackenhaut Services, 658 F.2d 705 (9th Cir. 1981), cert. denied, 456 U.S. 916; Contra: Kromnick, supra, n. 31, at 256.

[46] The "voluntary" plan invalidated by the district court in Kromnick, supra, n. 31, called for continuing mandatory reassignments to maintain satisfactory racial balances that had already been achieved. A voluntary plan which does not require mandatory reassignments and which aims to achieve initial compliance

with reasonable integration goals presumably would pass muster even under that ruling. Furthermore, there is substantial question whether the court in Kromnick has correctly applied the Supreme Court's key holding on voluntary affirmative action plans in United Steel Workers of America v. Webber, 443 U.S. 193 (1979), especially in light of the court's prior specific holding in Swann, supra, at 16, that ordering a prescribed racial balance in its school as a matter of educational policy "is within the broad discretionary powers of school authorities." See also Offermann v. Nitkowski, 378 F.2d 22 (2d Cir. 1967). Fiss, Racial Imbalance in Schools: The Constitutional Concepts 78 Harv. L. Rev. 564, 617 (1965).

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